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No. 1071

In the

Supreme Court of the United States

OCTOBER TERM, 1968

GROENDYKE TRANSPORT, INC.,
Petitioner,

vs.

ELMER DAVIS, REGIONAL DIRECTOR, 16TH REGION, NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SOUTHERN CONFERENCE OF TEAMSTERS, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT, SOUTHERN CONFERENCE OF TEAMSTERS' BRIEF IN OPPOSITION

L. N. D. WELLS, JR.
1601 National Bankers Life Bldg.
Dallas, Texas 75201
Attorney for Respondent,
Southern Conference of Teamsters

REILLY PUBLISHING COMPANY — 1710 S. HARWOOD — DALLAS, TEXAS — HA 8-8385

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Opinions Below

The Decision and Direction of Elections issued by the National Labor Relations Board on June 5, 1968, is reported at 171 NLRB No. 173, and is appended as Appendix A, *infra,* p. A-1.

The findings of fact of the United States District Court for the Eastern District of Texas are reported only in 69 LRRM 2046, and are reproduced at pp. A-1 through A-7 of the Petition for Certiorari.

The Opinion of the United States Court of Appeals for the Fifth Circuit, ... F.2d ....., is unofficially reported in 70 LRRM 2268, and is reproduced at pp. A-8 through A-18 of the Petition for Certiorari.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1.

Whether a United States District Court may enjoin the National Labor Relations Board from obtaining lists of names and addresses of eligible voters in aid of its election processes conducted pursuant to Sec. 9 of the National Labor Relations Act, 29 U.S.C. Sec. 159?

2.

Whether the Court of Appeals has power to assign a case to its summary calendar, and decide it upon briefs, without oral argument?

Statute and Regulations Involved

The pertinent provisions of the National Labor Relations Act, 29 U.S.C. Secs. 159, 161, and the Rules and Regulations of NLRB, Sec. 102.66(c), are reproduced in the Appendix.

Statement of the Case

This is an injunction case. Petitioner (herein "employer") obtained an injunction from the District Court for the Eastern District of Texas, forbidding the Regional Director of the NLRB (herein "Board"), who was conducting elections pursuant to the Order of the Board,[1] from obtaining the names and addresses of employees within the bargaining units in which the elections were to be held.

The Court of Appeals, on the basis of the full record and exhaustive briefs, placed the appeal on its summary calendar, and without hearing oral argument, reversed and vacated the injunction.[2]

1.

The Proceedings before NLRB

The Board's proceedings to investigate and certify representatives were initiated by the Southern

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[1] 171 NLRB #143 (June, 1968, reproduced at p.1-A, *infra*).

[2] —— F.2d ——, 70 LRRM 2268, reproduced at pp.A-8 through A-18 of the Petition for Certiorari.

Conference of Teamsters (herein "Union") filing petitions for certification in May 1967. Hearing on the petition was held at intervals commencing in July, 1967; recesses being required to enforce a subpoena duces tecum for information necessary to the Board's determination of the issue of appropriate bargaining unit.[3]

After full hearing, and consideration of extensive briefs, the Board on June 5, 1968, issued its Decision and Direction of Elections, 171 NLRB #143 (reproduced at pp. 1-Aff, *infra*), in which it provided, *inter alia*:

> "Election eligibility lists, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 16 within 7 days after the date of this Decision and Direction of Elections. The Regional Director shall make the lists available to all parties to the respective elections. No extension of time to file these lists shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement as to any election shall be grounds for setting aside that election whenever proper objections are filed. Excelsior Underwear, Inc., 156 NLRB 1236."

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[3] This subpoena was enforced, as modified, by the U.S. District Court for the Western District for Oklahoma, in Civil Action No. 67-357, styled: "NLRB on relation of Southern Conference of Teamsters v. Robt. McKennon, Vice President, Groendyke Transport, Inc." Judgment modifying and enforcing subpoena as modified entered November 27, 1967.

2.

The Injunction Proceedings

The employer refused to produce the lists of eligibles. The Board thereupon issued a subpoena for their production. No motion to revoke the subpoena was filed. Cf. Board's Rules (29 C.F.R. Sec. 102.66(c). Instead, the employer filed the instant injunction suit, and obtained a series of *ex parte* restraints prohibiting the Board from conducting the elections.

Thereafter, the District Court by the Order of August 1, 1968, held that the Board had no power to require the employer to produce the employee list, and "permanently enjoined" [4] the Board from instituting enforcement proceedings ". . . in any United States Federal (sic) District Court seeking enforcement of a Board subpoena duces tecum ordering production of the names and addresses of (employer's) employees pursuant to footnote 10 of the Board's Direction of Election . . ."

The Court of Appeals, in a unanimous Opinion by Chief Judge, Brown, reversed and vacated the injunction. It held that the injunction "amounts to an unwarranted intrusion into matters commit-

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[4] Ten days after the appeal was perfected to the Fifth Circuit on September 30, 1968, the District Court by *ex parte* Order entered October 10, 1968, attempted to forestall the appeal and maintain control of the case by amending the August 1 Order, "so as to grant the plaintiff an interlocutory injunction rather than a permanent injunction with respect to the Board's enforcement of the Excelsior rule." See "Order Modifying Judgment," entered October 10, 1968.

ted to the Board with a frustrating effect on a statutory mechanism that is to be swift and subject to minimal judicial scrutiny and then only under precise circumstances," [5] not here shown.

Argument

1.

Generally,[6] District Courts lack jurisdiction to interfere in NLRB election matters.

A. F. of L. v. Labor Board, 308 U.S. 401; *Boire v. Greyhound Corp.,* 376 U.S. 473, 477.

This case demonstrates the reason for the rule. Petitions for certification filed in May 1967, almost two years later, remain unresolved in March 1969. As the Circuit Court noted in the *Miami Herald* case there is "good reason for circumscribing court interference in representation matters . . . to avoid dilatory tactics which would postpone the commencement of bargaining when the employer really had no substantial objections to the conduct of the election other than a desire to delay bargaining as long as possible," 343 F. 2d 17, at 20, note 6.

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[5] Opinion, p. 8, Sec. III; Pet. for Cert., p. A-15.

[6] Only in "Three very narrow situations," noted by the Circuit Court at Slip Opinion, p. 9 (Pet., p. A-16), may a court interfere with election process: (1) where "public questions of international complexion are presented; *McCulloch v. Sociedad National,* etc., 372 U.S. 10 (1963); (2) where constitutional rights have been violated, Cf. *Fay v. Douds,* 172 F. 2d 720 (C.A. 2, 1949); and (3) where the Board has acted contrary to a specific prohibition in the Act, *Leedom v. Kyne,* 358 U.S. 184 (1958)."

2.

Even if the District Court had subject-matter jurisdiction, it erred in issuing the injunction, for no irreparable injury is shown. This record shows merely that the Board's Direction of Election instructed the employer to make available the names and addresses of eligible voters and that employer refused. The Board may require production of the lists only by subpoena enforcement in the District Court pursuant to Sec. 11 of the Act, 29 U.S.C. Sec. 161. Employer is not damaged until, and unless, such proceeding is instituted; and even then it has a plain and adequate remedy in opposing subpoena enforcement in whatever district court the proceedings are brought. *Wyman-Gordon v. NLRB,* 397 F. 2d 394.

Employer not having shown irreparable injury, and, to the contrary, it appearing that employer has a plain and adequate remedy under 29 U.S.C. Sec. 161, there is no basis for injunction. *Myers v. Bethlehem Shipbuilding,* 303 U.S. 41; *Norris, Inc. v. NLRB,* 177 F. 2d 26 (C.A.D.C., 1949).

3.

It is not necessary to decision here to pass on the validity of the Board's practice, first announced

in the *Excelsior* case, 156 NLRB 1236 (1966)[7] of requiring the employer in representation cases to submit the names and addresses of the eligible voters. It is open to employer to challenge the validity of a subpoena, and to there question the basis upon which the subpoena was issued, when and if the Board seeks to enforce subpoena in accordance with the statutory scheme pursuant to §11 of the statute, 29 U.S.C. §161.

Leedom v. Kyne, which is the asserted foundation for petitioner's claim of District Court jurisdictin to enjoin, emphasized that court intrusion was justified only in narrow circumstances, not here present; and then was at pains to note that there plaintiff had "no other means . . . to protect" its rights, 358 U.S. at 190. Moreover, as the court below noted, (Petition, p. A-18) *Boire v. Greyhound,* 376 U.S. 473 at 481, severely limits the *Leedom v. Kyne* exception to the general rule.

4.

Petitioner's frivolous contention (Pet. 22-25)

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[7] We note in passing that every Court of Appeals which has decided the point has upheld the propriety of the Board's practice of requiring production of the names and addresses of eligible voters, *NLRB v. Hanes Hosiery,* 384 F. 2d 188 (C.A. 4), cert. den. 390 U.S. 950; *NLRB v. Roblen,* 385 F. 2d 52 (C.A. 7); *Howell Refining Co. v. NLRB,* 400 F. 2d 213, 216 (C.A. 5); *NLRB v. Beechnut,* —— F. 2d ——, 69 LRRM 2845 (C.A. 2); *British Auto Parts v. NLRB,* —— F. 2d ——, 70 LRRM 2065, (C.A. 9). Even the First Circuit in *Wyman-Gordon,* while refusing to permit application of the rule until promulgated in accordance with that Court's notion of the requirements of the Administrative Procedure Act, indicated its approval of the requirement, if properly enacted. 397 F. 2d 394 at 396 (C.A. 1, 1968); cert. granted 393 U.S. 932, and argument submitted to the Supreme Court on March 3, 1969, *sub nom, NLRB v. Wyman-Gordon,* this Term No. 463.

that it was entitled to oral argument in the Court of Appeal's is fully answered by §II of the Court of Appeal's Opinion (Pet.App., pp. A-11- A-15).

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

MULLINAX, WELLS, MAUZY, LEVY & WELDON

By .....
L. N. D. Wells, Jr.

1601 National Bankers Life Bldg.
Dallas, Texas 75201

Attorneys for Southern Conference of Teamsters